(2)

93-1439

No. _____

In The

Supreme Court Of The United States

October Term, 1993

HOWARD YERUSALIM, *et al.*,

ALEXANDER HOSKINS, *Petitioner,*

v.

ELIZABETH KINNEY, *et al.*,

Respondents.

RESPONDENTS' ELIZABETH KINNEY, *et al.*, BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTIONS PRESENTED

1. Did the lower courts correctly hold that a Department of Justice regulation, 28 C.F.R. §35.151(e)(1), validly promulgated pursuant to the Americans With Disabilities Act, requires Petitioner to build curb ramps if, and only if, it resurfaces streets?

2. Did the lower courts correctly hold that Petitioner could not invoke an "undue burden" defense to avoid building curb ramps when it voluntarily chooses to resurface streets?

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RESPONDENTS' ELIZABETH KINNEY, et al., BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

Respondents Elizabeth Kinney, et al. respectfully request that the Court deny the petition for writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 9 F.3d 1067 (3d Cir. 1993). Pet. App. at A-1.[1] The opinion of the District Court is reported at 812 F.Supp. 547 (E.D. Pa. 1993). Pet. App. at A-18.

STATEMENT OF THE CASE

Elizabeth Kinney and eleven other persons with ambulatory disabilities and Disabled In Action of Pennsylvania, a non-profit organization comprised of persons with disabilities, sought declaratory and injunctive relief against Howard Yerusalim, Secretary of the Pennsylvania Department of Transportation,[2] and Petitioner Alexander Hoskins, Commissioner of the City of Philadelphia Streets Department, for violating the Americans With Disabilities Act, 42 U.S.C. § 12101 et seq., to require them to build curb ramps when they resurface certain streets. In the District Court, Plaintiffs and Defendant Hoskins filed cross-motions for

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[1]The designations "Pet. Br." and "Pet. App." refer, respectively, to the Brief and Appendix to the Petition for a Writ of Certiorari and "C.A. App." refers to the Appendix filed in the Court of Appeals.

[2]Pursuant to a Stipulation, Defendant Yerusalim agreed to build curb ramps at those streets in Philadelphia that PennDOT resurfaces. This Stipulation, by its terms, remains in effect unless the Supreme Court reverses the Third Circuit's decision.

summary judgment. The District Court granted Plaintiffs' motion, and the Court of Appeals unanimously affirmed.

Curb cuts[3] are critical to the everyday lives of persons who use wheelchairs, walkers, or crutches.[4] Street intersections without curb cuts present virtually insurmountable obstacles to commonplace activities. Writing for the Court of Appeals, Judge Roth stated: "[W]ithout curb cuts, people with ambulatory disabilities simply cannot navigate the city; activities that are commonplace to those who are fully ambulatory become frustrating and dangerous endeavors." Pet. App. at A-4. For example:

- Without curb cuts, people in wheelchairs often are forced to navigate their wheelchairs in the street, dodging cars, trucks and buses.
- The front wheels of a wheelchair are sensitive to obstacles and trying to cross an inaccessible

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[3]In this brief, the terms "curb cuts," "curb ramps," and "other sloped areas" are used interchangeably.

[4]Uncut curbs constitute significant accessibility barriers to a wide range of people with disabilities, whether or not they use mechanical devices to assist them in ambulation, including persons with severe arthritis, muscular dystrophy, multiple sclerosis, cerebral palsy, spina bifida, many forms of cancer, and brittle bone disease.

curb presents a real danger, causing wheelchairs to overturn and their occupants to fall and be injured.

- The excruciating pain associated with some disabilities may be exacerbated when wheelchairs are lifted over inaccessible curbs and the persons are jolted.

- People in wheelchairs are forced to retrace their routes after gaining access to the pavement and then discovering there is no curb ramp at the end of the block.

- In the absence of curb cuts, people with disabilities have difficulty seeking and retaining employment, traveling safely for work or pleasure, and participating in social and cultural activities. C.A. App. at 182-189.

Street alterations include reconstruction and milling projects, but the common denominator of all of the projects is that they involve resurfacing. Whenever a street is reconstructed and/or milled, by necessity it must also be resurfaced. Resurfacing involves work from intersection to intersection. As the Court of Appeals observed, all street reconstruction and milling, based on the City's own specifications, have "certain minimum requirements for resurfacing". Pet. App. 5. These requirements include inter alia, "laying at least 1-1/2 inches of new asphalt, sealing open joints and cracks, and patching depressions of more than one inch." Id. In addition, all resurfacing also includes

installing bituminous material on all vertical surfaces of curbs and gutters. There are different types of paving material used in all resurfacing jobs, depending on the desired skid resistance, wearability and appearance. C.A. App. 128-132.

Resurfacing involves much more than normal maintenance or minor repairs. While City employees repair potholes, small patching, and other minor street repairs, "resurfacing" is performed for the most part by private contractors. Plaintiffs do not contend --and the lower courts did not hold -- that minor repairs or maintenance trigger the City's obligation under the Americans With Disabilities Act to install curb ramps; rather, they assert, and the lower courts held, only that the City must install curb ramps when it chooses to resurface entire streets. As the Court of Appeals explained: "[A]t issue in this appeal are those resurfacings which cover, at a minimum, an entire street from intersection to intersection. Thus, we are not called upon to decide whether minor repairs or maintenance trigger the obligations of accessibility for alterations under the ADA." Pet. App. at A-5.

On the basis of these facts, both the trial and appellate courts held that Petitioner violated 28 C.F.R. § 35.151(e)(1). This regulation, the courts concluded, requires Petitioner to install curb cuts on those streets they choose to resurface, so that persons with ambulatory disabilities can have access to streets equal to persons without disabilities.

ARGUMENT

Cutting through the verbiage, Petitioner seeks certiorari for two unpersuasive reasons. First, he desires that this Court factually re-examine whether street resurfacing "always, sometimes, or never," Pet. Br. at 8, constitutes an "alteration" under 28 C.F.R. § 35.151(e)(1). It is not the role of this Court to make such factual assessments. Moreover, the District Court and the Court of Appeals both correctly determined that intersection-to-intersection resurfacing is an alteration, regardless of whether more extensive work (such as milling or complete reconstruction) is performed.

Second, Petitioner seeks to challenge 28 C.F.R. § 35.151(e)(1), a validly promulgated regulation. Petitioner asserts that the linkage of streets and curbs, endorsed by both lower courts, is "unreasonable". Pet. Br. at 14. This argument defies the express language of the regulation. Similarly, Petitioner's argument that an undue burden defense should be permitted is based on its unwillingness to recognize the regulation's link between streets and curbs. Thus, Petitioner is, in reality, attacking the validity of the regulation. Petitioner never argued in the courts below that DOJ exceeded its authority in promulgating this regulation, and it cannot be heard to do so now.

There is no cogent reason to grant certiorari. The Third Circuit's decision is not in conflict with any

decision of this Court or any other appellate court (or even any district court). Indeed, the Third Circuit's decision is the only appellate decision to date which has interpreted the Americans with Disabilities Act, and the only decision in any court regarding the duty of a public entity to construct curb ramps. Moreover, the Third Circuit's decision is supported by the Department of Justice ("DOJ"), which promulgated the regulation at issue. The DOJ filed an amicus brief and participated in oral argument in the Court of Appeals supporting the District Court's construction of 28 C.F.R. § 35.151(e)(1). An agency's interpretation of its own regulation must be given "controlling weight unless it is plainly erroneous . . ." Stinson v. United States, 113 S. Ct. 1913, 1919 (1993).

REASONS FOR DENYING CERTIORARI

I. The Lower Courts' Conclusion That Resurfacing Constitutes an Alteration Is Not Inconsistent With Any Decision of This Court or Any Other Appellate Court nor Does It Raise Any Important Legal Question Which Necessitates Resolution By This Court.

Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12134, prohibits discrimination by public entities against individuals with disabilities. 42 U.S.C. § 12132. Congress delegated broad authority to the DOJ to promulgate regulations implementing Title II. 42 U.S.C. § 12134. The DOJ's

validly promulgated regulations draw a sharp distinction between "new construction and alterations" and "existing facilities." Compare 28 C.F.R. § 35.151 (new construction and alterations) with 28 C.F.R. § 35.150 (existing facilities). Included in the former regulation is the subpart at issue here which simply states:

> Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway.

28 C.F.R. § 35.151(e)(1).

Petitioner takes issue with the Court of Appeals' conclusion that an "alteration" of a street under 28 C.F.R. § 35.151(e)(1) (which triggers the requirement that a public entity install curb ramps) is "a change that affects the usability of the facility involved." Pet. App. at A-10. The Third Circuit based this definition on two sources: 28 C.F.R. § 35.151(b) and the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities ("ADAAG"), which is referenced in 28 C.F.R. § 35.151(c). Pet. App. at A-9-A-10. Looking to other subparts of Section 35.151 to determine what "alteration" means in the context of

Section 35.151(e)(1) is certainly appropriate.[5] The Court of Appeals then correctly determined that resurfacing, as done by Petitioner, changes the usability of the street and, thus, is an alteration. Pet. App. at A-12.[6]

If resurfacing is an alteration, then 28 C.F.R. § 35.151(e)(1) mandates that Petitioner install curb cuts on those streets which it chooses to resurface. Petitioner, though, asserts that adoption of the Uniform Federal Accessibility Standard ("UFAS")[7] definition

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[5]Contrary to Petitioner's assertion, the Third Circuit did not completely incorporate ADAAG's definitions into the ADA. Pet. Br. at 13. Rather, it simply looked to ADAAG for guidance in identifying an appropriate definition of "alteration."

[6]In his Petition, Petitioner does not assert that resurfacing does not affect the usability of the street.

[7]Petitioner asserts that the Third Circuit should have adopted the definition of "alteration" embodied in UFAS, which is also referenced in 28 C.F.R. §35.151(c). UFAS provides that an "alteration" of a building or structure "means a change or rearrangement in the structural parts or elements." Pet. Br. at 13 (quoting Appendix A to 41 C.F.R. Part 101-19.6). Adoption of the UFAS definition, however, would not lead to a different result than adoption of the "usability" definition embodied in Section 35.151(b) and ADAAG; street resurfacing does change the structural parts of a street by adding or replacing the top layer, and, therefore, would constitute an alteration under UFAS.

"would not have led the lower courts to the unreasonable result of linking the installation of curb cuts to the resurfacing of streets." Pet. Br. at 14. Petitioner then labels this link "unreasonable." Id. However, adoption of the UFAS definition of alteration (rather than the "usability" definition adopted by the Court of Appeals) would not break the link between streets and curbs. It is the DOJ regulation, 28 C.F.R. § 35.151(e)(1), (not the definition of alteration) that "unifies a street and its curbs for treatment as interdependent facilities," as the Court of Appeals determined. Pet. App. at A-10.

In essence, Petitioner's assertion that it is unreasonable to link curb cuts to street alterations, Pet. Br. at 14-15, is an attack on 28 C.F.R. § 35.151(e)(1) itself. Petitioner evidently believes that DOJ should have required the installation of curb ramps only when the curb itself is altered -- not when the street is altered.[8]

Indeed, Petitioner himself only asserts that adoption of this definition would "probably not include street resurfacing." Pet. Br. at 14 (emphasis added).

[8]The ADA regulations require installation of curb ramps when either curbs or streets are altered. 28 C.F.R. § 35.151(e)(1)-(2). Prior to promulgation of these regulations, the federal government required only installation of curb cuts when curbs were constructed. 49 C.F.R. § 27.75; 44 Fed. Reg. 31454 (1979). Petitioner's desire to return to the pre-ADA days cannot be permitted to repeal properly promulgated regulations.

Petitioner's argument, if successful, would effectively repeal a validly promulgated regulation. In fact, Petitioner never asserted in either the District Court or the Third Circuit that the DOJ exceeded its broad statutory authority when it promulgated Section 35.151(e)(1) or that it otherwise violated the law in doing so. Petitioner cannot raise this argument for the first time in this Court.

Substantively, the DOJ's link of curb cuts to street alterations is not unreasonable. The regulation's link between street alterations and curb cuts constitutes a determination by the DOJ that installing curb cuts when streets are altered is reasonable, and it is not for Petitioner or the courts to annul that determination. Pet. App. at A-13. In Southeastern Community College v. Davis, 442 U.S. 397 (1979), and Alexander v. Choate, 469 U.S. 287 (1985), this Court concluded that a public entity may refuse to make an accommodation only if it imposes undue financial and administrative burdens or requires a fundamental or substantial alteration in the nature of the program. See Alexander v. Choate, 469 U.S. at 300; Davis, 442 U.S. at 410. Thus, DOJ has administratively determined that installing curb cuts when a street is altered is a reasonable accommodation since doing so

will not impose undue burdens or fundamentally change programs.[9]

The DOJ's link of curb cuts and street alterations is supported by the ADA's legislative history. Congress intended the ADA to lead to the removal of unnecessary architectural barriers. "The employment, transportation, and public accommodation sanctions of this Act would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets .... [U]nder this title, local

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[9]Section 35.151(e)(1) is not the only regulation in which the DOJ has linked two elements. In the DOJ's regulations under Title III of the ADA (governing public accommodations), the DOJ requires:

> An alteration that affects or could affect the usability of or access to an area or facility that contains a primary function shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area and the restrooms, telephones, and drinking fountains serving the altered area, are readily accessible and usable by individuals with physical disabilities.

28 C.F.R. § 36.403. For example, if a supermarket alters its checkout counters, it must ensure that the path of travel to these counters is accessible even though it made no alteration to the path itself. Similarly, DOJ requires the path of travel to restrooms, telephones, and drinking fountains must be made accessible even when no alterations are made to them directly.

and state governments are required to provide curb cuts on public streets." H. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 84 (1990).

Petitioner's assertion that requiring installation of curb cuts when it alters streets will thwart its transition plan, Pet. Br. at 15 is a red herring that the Third Circuit correctly rejected. Pet. App. at A-8-A-9 n.4. While Petitioner is correct that 28 C.F.R. § 35.150(c) requires the City to build curb cuts by January 26, 1995, at least on streets near government offices, transportation facilities, and places of public accommodation, Pet. Br. at 10, Respondents do not seek enforcement of that sub-part. More importantly, there simply is no conflict between Section 35.150(c)'s requirement that the City have and implement a transition plan for the installation of curb cuts and Section 35.151(e)(1)'s requirement that curb cuts be installed as streets are altered. As the Court of Appeals wrote: "The two provisions complement each other in achieving the ultimate ADA goal of full access for people with disabilities." Pet. App. at A-9 n.4.

Both regulations illustrate the ADA's gradualist approach. Congress sought to balance the costs of eliminating all architectural barriers immediately with the need to create an accessible society. Thus, the DOJ's transition plan regulation, 28 C.F.R. § 35.150(c), requires that only those streets with key facilities (e.g., public accommodations and government buildings) have curb cuts by January 25, 1995.

Similarly, 28 C.F.R. § 35.151(e)(1), the regulation involved here, only requires public entities to install curb cuts when it voluntarily chooses to alter streets.[10] In this way, as a city is gradually resurfaced, it will become accessible to people with disabilities.

Finally, certiorari is not warranted to have this Court examine what Petitioner claims are factual issues precluding summary judgment. Petitioner does not challenge the standard for summary judgment applied by either of the lower courts; he only disputes the application of the standard to the facts. Whether Philadelphia's resurfacing, as compared to other cities' resurfacing, "affects the usability" of the street does not raise an important legal question. Yet, Petitioner wants this Court to review whether the laying of 1½ inches of asphalt (as opposed to perhaps 2 inches or 1 inch that other cities might require) or whether excavating a city street to install a sewer pipe constitute an alteration under 28 C.F.R. § 35.151(e)(1). These factual issues are beyond the realm of this Court.

Substantively, there simply are no factual issues. It does not matter that there are "different types of resurfacing which are performed and the different circumstances which necessitate street resurfacing." Pet. Br. at 17. Regardless of whether the alteration

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[10]Individuals with disabilities cannot compel Petitioner to build curb ramps at specific streets unless he has chosen to resurface those particular streets.

involves reconstruction, street excavation to access water, sewer, or electric lines, milling, or simply applying a new layer of blacktop, the bottom line is that all of these activities require resurfacing. Pet. App. at A-12 n.7. The evidence presented led both lower courts to conclude that intersection-to-intersection resurfacing, as performed by Petitioner in the instant action, is an alteration. Pet. App. at A-12, A-25-A-26. Petitioner is incorrect in his effort to challenge this factual conclusion by asserting that resurfacing is mere "maintenance." Pet. Br. at A-16. As the Third Circuit wrote: "At a minimum, [resurfacing] requires the laying of a new asphalt bed spanning the length and width of a city block. The work is substantial, with substantial effect." Pet. App. at A-12.

II. The Lower Courts' Conclusion that There is No Undue Burden Defense Is Not Inconsistent With Any Decision Of This Court or Any Other Appellate Court Nor Does It Raise Any Important Legal Question Which Necessitates Resolution By This Court.

Both the District Court and the Court of Appeals correctly concluded that when a public entity resurfaces (i.e., alters) a street, it must install a curb ramp regardless of the burden of doing so. Pet. App. at A-14, A-26-A-27. Petitioner's challenge to this conclusion is another thinly-veiled attack on the legitimacy of 28 C.F.R. § 35.151(e)(1).

The DOJ regulations under Title II adopt the historical dichotomy between new construction and alterations on the one hand and existing facilities on the other hand. Compare 28 C.F.R. §§ 39.150, 35.150 (Rehabilitation Act of 1973 and ADA regulations governing existing facilities) with 28 C.F.R. §§ 39.150, 35.151 (Rehabilitation Act of 1973 and ADA regulations governing new construction and alterations). Historically, public entities have been able to assert an "undue burden" defense with respect to regulations concerning retrofitting of existing facilities, but not with respect to making new construction or alterations accessible.

Petitioner does not challenge this dichotomy; he does not contend that an undue burden defense is available with respect to making new construction and alterations accessible. Pet. Br. at 18-19. Rather, Petitioner asserts that 28 C.F.R. § 35.151(e)(1) "occupies a middle ground" between existing facilities and new construction/alterations because the curb and sidewalk are not altered. Pet. Br. at 19. As the Third Circuit determined, however, 28 C.F.R. § 35.151(e)(1) unifies the street and the curb into a single facility, and resurfacing alters that facility. Thus, there is an actual alteration of a facility, and the undue burden defense is not available.

Petitioner's argument depends upon the dissolution of the regulatory link between streets and curbs.

Petitioner states that the lower courts' conclusion is based on "a rigid, mechanistic and unreasonable interpretation that requires correction by the Court." Pet. Br. at 19. Yet, the lower courts' interpretation is drawn directly from the language of the regulation. Petitioner seeks to have this Court move subpart 35.151(e)(1) from the "new construction and alterations" provision, 28 C.F.R. § 35.151, to the regulation governing existing facilities, 28 C.F.R. § 35.150, in order to create an undue burden defense. As discussed above, the lower courts found no justification to second-guess the DOJ's placement of the curb cut regulation in the new construction/alteration section, and Petitioner has not advanced any more persuasive reason to do so in its Petition.

CONCLUSION

Because the instant case presents no important legal questions that would justify review by this Court and there is no conflict among circuits, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Brief of Respondents in Opposition to the Granting of a Writ of Certiorari were served this 18th day of March, 1994, by U. S. mail, certified, return receipt requested, on petitioner's counsel as follows:

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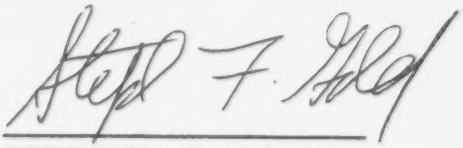

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